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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	Docket No 98-122
City Utilities of Springfield;	)	
City of Columbia Water & Light;	)	
City of Sikeston Board of Utilities.	)	
	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutes of Missouri	)	

COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association (NTCA) respectfully submits its comments in the above-referenced proceeding. NTCA is a national association of approximately 500 local exchange carriers (LECs). These LECs provide telecommunications services to end users and interexchange carriers throughout rural America, including in the state of Missouri.

The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities (collectively "the Missouri Municipals") filed the instant petition (the "Missouri Petition") for an order preempting Section 392.410(7) of the Revised Statutes of Missouri (HB620). The Missouri Municipals request that the Commission review HB620 based on issues and arguments already decided by the Commission less than a year ago in a case involving a Texas regulatory

act.[1] As such, the instant petition is a frivolous exercise and a waste of the Commission's time.

I. THE TEXAS ORDER WAS PROPERLY DECIDED

The Missouri Municipals' petition relies on their own finding that the Texas Order was wrongly decided. In the *Texas Order,* the FCC declined to preempt Section 3.251(d) of the Texas Public Regulatory Act of 1995 (PURA95). PURA95, in part, precluded a municipality or municipal electric system from providing telecommunication services. The FCC concluded that the municipality in question, the City of Abilene, Texas, was not an "entity" separate and apart from the state of Texas for the purpose of applying Section 253 of the Act.[2] As such, Section 253(a) did not bar the State of Texas from restricting entry into telecommunications markets by its political subdivisions. The Commission cited the Supreme Court of the United States in stating that, "[p]olitical subdivisions of States . . . never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . ."[3]

The Commission followed the Supreme Court's analysis and concluded that political subdivisions of the state are not "entities" separate and apart from the state itself. Therefore,

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[1] *In the Matter of the Public Utility Commission of Texas, Memorandum Opinion and Order,* 13 FCC Rcd 3460 (1997). ("Texas Order"), petition for review pending in *City of Abilene, TX and the American Public Power Association v. FCC*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

[2] Pub. L. No. 104-104, 110 Stat. 56, (codified in scattered sections of 47 U.S.C.).

[3] *Texas Order,* p. 3545, *citing Sailors v. Bd. of Educ. of Kent County.*, 387 U.S. 105, 107-108 (1967), *quoting Reynolds v. Sims*, 377 U.S. 533, 575 (1964), *quoting Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

Section 253(a) prohibits restrictions on market entry that apply to independent entities subject to state regulation, but does not prohibit restrictions that apply only to political subdivisions of the state itself.[4] While the Commission discouraged other states from adopting similar legislation,[5] it recognized that PURA95 was an "exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions."[6]

Nothing put forth by the Missouri Municipals changes this well-reasoned analysis and conclusion.[7]

II. SECTION 253 DOES NOT REQUIRE PREEMPTION OF HB620

The Missouri Municipals attempt to use recent case law to demonstrate that the FCC misconstrued the definition of the word "entity" in the *Texas Order*. They cite *Alarm Industry Communications Committee v. FCC*[8] first, for their argument that the FCC defined the word too

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4 *Texas Order*, p. 3547.

5 *Id.*, p. 3549.

6 *Id.*, p. 3545.

7 The Missouri Municipals correctly point out that the *Texas Order* did not specifically decide whether Section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility *(Missouri Petition,* p. 3). The Missouri Municipals, however, fail to distinguish this issue and appear to instead rely on their argument that the *Texas Order* was wrongly decided. Since the Missouri Municipals assume that had the Commission decided the specific issue of whether Texas could prohibit municipally-owned electric utilities from providing telecommunications service, it would have declined preemption, this comment makes a similar assumption and does not separately discuss the issue. In any event, the Missouri statute in question refers to "political subdivisions" and assumes that municipally-owned electric utilities are "political subdivisions." The Commission properly recognizes that the scope of authority delegated to "political subdivisions" is in the state's purview. *Texas Order* at para. 181.

8 131 F.3d 1066 (D.C. Cir. 1997).

narrowly. However, the court in *Alarm Industry* specifically stated that it would "not foreclose the Commission from interpreting the phrase narrowly." The court stated that whatever interpretation the FCC adopted "must be supported by more than a dictionary."[9] The *Texas Order* determined that the City of Abilene was not an entity separate and apart from the state of Texas based, in part, on decisions by the United States Supreme Court. Suffice it to say that the Supreme Court carries a bit more weight in the administrative process and judicial system of this country than *Black's Law Dictionary.*

The Missouri Municipals' reliance on *Bell Atlantic Telephone Companies v. FCC*[10] is similarly misplaced. In this case, the Court found the Commission's interpretation of an ambiguous statute to be reasonable. The Court did reiterate "the traditional tools of statutory construction", as the Missouri Municipals point out, but this in no way invalidates the Commission's decision in the *Texas Order.* There is no evidence that the Commission failed to use "traditional tools of statutory construction" in interpreting Section 253. It is perfectly reasonable that the Commission searched for an "express" statement regarding whether Congress intended to enact legislation that contradicted several Supreme Court decisions and Constitutional notions of separations of powers. Clearly, if Congress intended such a result, it would have "expressly" discussed it somewhere in the legislative history.[11] In any event,

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9 *Id.*, p. 1071.

10 131 F.3d 1044 (D.C. Cir. 1997).

11 In fact, according to the Supreme Court, preemption analysis "[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It is only logical that given an ambiguous statute, the Commission would look for "express" language in the legislative history to determine the clear and manifest purpose of Congress.

reference to the legislative history is but one source available to the Commission in interpreting ambiguous meanings.

Recent Commission statements do not, as the Missouri Municipals would have us believe, lead to a conclusion contrary to the one in the *Texas Order*. Municipalities and municipal electric utilities had to make contributions to the Universal Service program or abide by the Pole Attachment Order[12] whether or not they were "entities" separate and apart from the States. The fact that the FCC referred to municipalities as "entities" subject to the rules governing other providers of telecommunications services is not dispositive under Section 253 which, when interpreted in light of the federal Constitution, leaves states free to decide whether their subdivisions may provide telecommunications or other services. There was no preemption or application of Section 253 in the cases cited by petitioner.[13]

The Missouri Municipals go into a very lengthy discussion of the legislative history of Section 253. However, their interpretations and conclusions do not come from the words contained in the legislative history. The Missouri Municipals merely extract portions of legislative history and subsequent letters and frame them in a manner supportive of their position. A careful reading indicates that the Missouri Municipals formulate conclusions with a specific intent in mind. Nevertheless, this does little to change the fact that the decisions of the *Texas Order* were well-reasoned and logical.

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[12] *In the Matter of Implementation of Section 703(a) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments,* CC Docket No. 97-151, *Report and Order*, FCC 98-20 (rel. Feb. 6, 1998).

[13] Interestingly, in each and every instance cited by the Petitioners where a municipality is involved, the Commission refers to it as a "governmental entity." Nowhere cited by the Missouri Municipals are municipalities simply lumped together with and not discussed separately from other "entities." (*Missouri Petition*, p. 19).

House Bill 620 repealed and replaced Section 392.410 of the Revised Statues of Missouri. The portion of the new Section 392.410 that applies to municipalities and municipal electric utilities reads as follows:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
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> (1) for its own use;
> (2) for 911, E-911 or other emergency services;
> (3) for medical or educational purposes;
> (4) to students by an educational institution;
> (5) or Internet type services.
>
> The provisions of this subsection shall expire on August 28, 2002.[14]

The state of Missouri thus prohibits its own political subdivisions from competing with private telecommunications providers. It is easy to understand the state legislature's decision. Perhaps because municipalities receive tax dollars, the legislature thought it unfair to allow them to compete with the private industry. Municipalities and municipal-owned utilities also have more rights than the average telecommunications provider. The municipalities generally have eminent domain privileges and access to the infrastructure and rights of way which gives them a competitive advantage. Whatever the reasons, the Telecommunications Act prohibits local governments from preventing private entities from providing competitive local exchange service. Nothing in the Act nor the legislative history allows the Commission to require a state to permit

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[14] It is worth noting that the legislation at issue here is less restrictive than what was considered in the *Texas Order*.

its political subdivisions to compete with private telecommunications providers. The right to decide whether political subdivisions provide one type of service or another, engage in business enterprises, or perform other functions is reserved to the state.[15]

CONCLUSION

For the above-stated reasons, the Commission should not preempt HB620.

Respectfully submitted,

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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August 13, 1998

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[15] *Texas Order* at para. 181.

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC Docket No. 98-122;DA 98-1399 was served on this 13th day of August 1998, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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